Supreme Court, U.S.
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No. 06-872

IN THE

Supreme Court of the United States

Aquil K. Wiggins,
Petitioner

v.

Virginia Department of Corrections,
Respondent

On Petition For Writ Of *Certiorari*
From the Fourth Circuit Court of Appeals

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

In direct contradiction to this Court's holding in Slack v. McDaniel, 529 U.S. 473 (2000), the District Court and the Fourth Circuit refused to grant the Petitioner a certificate of appealability in regards to his constitutional claim. Did the District Court and Fourth Circuit err when they held that reasonable jurists would not find it debatable that the Petitioner had been denied his constitutional right to be found not guilty in the absence of evidence sufficient to prove his guilt beyond a reasonable doubt?

Did the United States District Court and Fourth Circuit Court of Appeals err when they held that the Petitioner was not denied his right to effective assistance of counsel on appeal when the Petitioner's appellate counsel failed to perfect the appeal from the Court of Appeals of Virginia to the Supreme Court of Virginia, and as a direct result of that ineffective representation Petitioner expended a *habeas corpus* petition prepared by that ineffective lawyer, which only addressed the right to a delayed appeal and ignored everything else?

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"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

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"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF *CERTIORARI*

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment below.

OPINIONS BELOW

The Mandate of the Fourth Circuit Court of Appeals is set out in the Appendix "A", *infra*. An unpublished opinion of the Fourth Circuit Court of Appeals affirming the decision of the U.S. District Court, Eastern District of Virginia, Alexandria Division, which is set out in the Appendix "B", *infra*. The Memorandum opinion and accompanying Order of the decision of the U.S. District Court for the Eastern District of Virginia, Alexandria Division, which is set out in the Appendix "C", *infra*.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on September 19, 2006. Pursuant to the United States Supreme Court Rule 10(c), the Fourth Circuit has decided an important question of federal law that conflicts with relevant decisions of this Court and therefore the Petitioner is seeking review. Jurisdiction for this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioner, Aquil K. Wiggins, is an inmate resident of Chesapeake, Virginia, currently being incarcerated at the Saint Brides Correctional Facility. On August 3, 1998, a Grand Jury in the City of Hampton, Virginia, indicted the Petitioner on the charges of Robbery in violation of Section 18.2-58 of the Code of Virginia, 1950, as amended; Use of a Firearm in the Commission of a Felony (Robbery) in violation of 18.2-53.1 of the Code of Virginia, 1950, as amended; Attempted Car-jacking in violation of 18.2-58.1 and 18.2-26 of the Code of Virginia, 1950, as amended; Use of a Firearm in the Commission of a Felony (Attempted Car-jacking) in violation of 18.2-53.1 of the Code of Virginia, 1950, as amended; Possession of a Firearm by a Convicted Felon in violation of 18.2-308.2 of the Code of Virginia, 1950, as amended. (Tr. at p. 6)

The Petitioner was tried on these charges before the Circuit Court of the City of Hampton, Virginia. On May 4, 1999 (after a one day bench trial), the court found the Petitioner guilty of all charges. (Tr. at p.157). He was sentenced to 35 years incarceration, with 19 years suspended. The Petitioner filed a

timely appeal to the Court of Appeals of Virginia. The appeal was refused on November 10, 1999. Due to the Petitioner's counsel's ineffective representation, the deadline for appealing to the Supreme Court of Virginia was missed thereby foreclosing his appeal to the Supreme Court of Virginia.

The Petitioner's counsel then filed a Petition for Writ of *Habeas Corpus* Request for a Delayed Appeal in the Supreme Court of Virginia admitting his ineffective representation. No other issues were raised. In its May 8, 2001, answer, the Commonwealth of Virginia admitted that the Petitioner's counsel's ineffective representation had deprived the Petitioner of his right to appeal. On June 12, 2001, the Supreme Court of Virginia granted the Petitioner a delayed appeal. The Petitioner's counsel filed a Petition for Appeal on July 17, 2001. On November 29, 2001, the Supreme Court of Virginia denied the Petitioner's appeal.

On September 25, 2002, the Petitioner filed a Petition for Writ of *Habeas Corpus* in Hampton Circuit Court *pro se*. The Hampton Circuit Court dismissed such petition on January 10, 2003. The Petitioner appealed the dismissal to the Supreme Court of Virginia on February 4, 2003. On April 17, 203, the Petitioner made a motion to amend his appeal by including prior pleadings, documents, and exhibits as part of the record. That motion was denied on May 2, 2003. On June 26, 2003, the Petitioner made a motion to amend his appeal to include claims not previously known or available to him, which was denied on July 24, 2003. On September 2, 2003, the Supreme Court of Virginia denied the Petitioner's appeal. The Petitioner, *pro se*, filed a Petition for Writ of *Habeas Corpus* in the United States District Court for the Eastern District of Virginia on November 30, 2003.

The District Court dismissed his petition and refused to grant a 28 U.S.C. § 2253(c) certificate of appealability on August 29, 2005. On September 27, 2005, the Petitioner filed a Request for Certificate of Appealability in the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, in an unpublished opinion, denied his request on July 18, 2006. The Petitioner requested a rehearing *en banc* and such request was denied on September 11, 2006. The Fourth Circuit issued a mandate making its July 18, 2006 opinion effective September 19, 2006. From those decisions, the Petitioner now files this Petition for Writ of *Certiorari*.

ANALYSIS

Question 1:

The District Court and Fourth Circuit erred when they held that reasonable jurists would not find it debatable that the Petitioner had been denied his constitutional right to be found not guilty in the absence of evidence sufficient to prove his guilt beyond a reasonable doubt.

An appeal may not be taken from the final order in a habeas corpus proceeding unless the circuit judge issues a certificate of appealabilty ("COA"). 28 U.S.C. § 2253(c)(1). A COA will not be issued absent a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that reasonable jurists would find assessment his constitutional claims which the district court denied to be debatable. Slack v. McDaniel, 529 U.S. 473 (2000).

In reviewing a *habeas corpus* petition based on a claim that has been addressed by a state court on the merits, a federal

court may not grant the petition unless the state court's decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). The question for a court to ask is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

In the case before this Honorable Court, the facts about which reasonable jurists could absolutely differ and is based upon an unreasonable determination of the facts by the lower court. The facts of this case are that a man named Herbert Harrison went to the Food Lion at Colliseum Crossing Shopping Center in Hampton, Virginia, on the 28th day of September, 1997, to buy groceries. (Tr. at p. 13) That upon arriving at the shopping center Harrison observed a man standing in the parking lot of the Food Lion by the shopping cart return. (Tr. at 13) Harrison then testified that "for whatever reason that night, I circled the parking lot and then parked." (Tr. at pp.s 13-14) He entered the Food Lion purchased some grocery items and returned to his car and put the items in the trunk of his car. (Tr. at p. 14). He testified that, "I never returned baskets but this night, I returned the basket." (Tr. at p. 14)

Harrison then testified that the robber, who was standing at the cart return, placed a gun at Harrison's side and demanded his wallet or else he would kill him. (Tr. at p. 14) Harrison then stated the following statements : "I was overly concerned due to the fact that it was, a light was there. I could see his face. He did not have a mask on. There was no disguise. There were people in the parking lot." (Tr. at pps. 14-15) Harrison described putting his hands up in the air to draw attention to the fact that he was being robbed. (Tr. at 15) He turned over the wallet to the man and the keys to his car, which were in his hand. (Tr. at p. 15) He testified that the robber then

advised him to run, but that he did not run. (Tr. at p. 15)

Harrison testified that the robber proceeded to his car and got inside to take his car. (Tr. at p. 15) Harrison ran up to the car window and looked in where the robber his left hand on the steering wheel and his right hand on the ignition. (Tr. at p. 15) Harrison, ". . . pulled the door open and grabbed his right hand, and pulled him out of the car." (Tr. at p. 15) The two men began to scuffle and fight at that time. (Tr. at pps. 15-16). **Harrison he ripped the robber's shirt off of him.** (Tr. at p. 16) (emphasis added)

At that time, according to Harrison, a lady came screaming across the parking lot and another was coming down in her car to follow the robber. (Tr. at p. 17) Further, he testified that the robber then ran and escaped. (Tr. at p. 17).

A police composite was made a couple of days later using the man's description provided by Harrison. It was introduced as Commonwealth's Exhibit Number One in the trial. (Tr. at p. 20) He described the robber as being a black male, light to medium complexion, 5'7" tall and weighing between 130 to 140. (Tr. at pps. 26-27)

Detective Killilea had Harrison come to his office a week to a week and a half later to show him a photo line up. (Tr. at p. 20) Harrison described looking at the photos and said, "I can tell you that the photographs that were shown to me after the process I used was the **complexion and then his eyes and his nose.** I don't know if anyone's ever been in that situation. But it is something you don't forget." (Tr. at pps. 20-21). (Emphasis added)

Harrison testifed that he looked at the photos and that, "I recall setting one on the side that I thought was the individual, but wasn't sure until I looked at the rest of them. And then I went back to that one." (Tr. at p. 21). The only light complexioned black male in the photograph line up was the Petitioner. The rest of the photos were of dark skinned, black

males. Detective Killilea stated that Harrison was not sure about the photo line-up and that he had to show him a prior mug shot of the Petitioner for identification. (Tr. at p. 75) He was shown a single photograph.

On cross-examination, Harrison stated that the Petitioner had a light colored skull cap on with holes in the top of it. (Tr. at p. 25) He further testified that the lighting in the parking lot was "very good" at the time of the offense. (Tr. at p. 25) When asked if he saw what the robber's hair looked liked Harrison, testified that **" I didn't really notice his hair. I noticed his eyes and the way he stared at me."** (Tr. at 26) Harrison also testified that he looked into the robber's eyes, but did not know the color of the robber's eyes. (Tr. at p.26) Harrison did not see any tattoos on the robber's chest when he ripped off the robber's shirt. (Tr. at p.36) The Petitioner has green eyes and freckles, which is unusual for a black male, and he also had a large tattoo of the star of David on his left pectoral region of his chest. (Tr. at p. 142).

It strains credibility to believe that an African-American male, such as Mr. Harrison, who looked intently into the robber's eyes for several minutes did not know the color of the perpetrator's eyes. If Petitioner was the perpetrator, Harrison would have noticed the green eyes and freckles since they are unusual for an African-American male. Further, the fact of the light complexion and freckles across the Petitioner's nose also make him unusual; however, Harrison reported the man he saw had no freckles, nor the very light complexion of the Petitioner. He also did not see the Star of David tattoo when he removed the shirt.

The prosecution's second witness, Eve Jernigan, stated that she did not get a good look at the robber at the scene of the attack. (Tr. at p.59) The prosecution's final witness, Karen McAdoo, testified that the robber had no tattoo on his chest; therefore, the perpetrator could not be the Petitioner. (Tr. at

p.93) Furthermore, the police officer assigned to the case, Detective Killilea, testified that after he showed Eve Jernigan a set of photographs of suspects and she was not sure, he then showed her a single, more suggestive photograph of the Petitioner. (Tr. at p.71) This was the second single one-on-one photograph shown to a prosecution witness.

The Petitioner presented an eye witness, Crystal Holloman, who the prosecution did not call. She saw the robbery and unequivocally stated that the Petitioner was not the robber. (Tr. at p.110) She had been in the Food Lion parking lot waiting for her mother, who was shopping in the store. (Tr. at p. 101) She stated that she and her little sister were in the car in the parking when they observed the man standing by the cart return. (Tr. at p. 101). She said that they were considering the guy as a possible date for her sister. (Tr. at p. 101) She really observed him for a period of minutes in the car, then walked past him to use a pay telephone. (Tr. at p. 103) Miss Holloman testified that the man was dressed in baggy jeans, white t-shirt, sneakers, a light colored skull cap that was open at the top and that she could see plaits of his hair because his hair was braided. (Tr. at pp. 101-102) She testified that she observed the robber approach Harrison and saw Harrison put his hands up. She saw no weapon. (Tr. at pps. 103-104).

Miss Holloman saw them begin to struggle and she ran toward them because she thought Harrison was being robbed. (Tr. at p. 105) She ran up to the robber and said to him, "why you had to do that?" (Tr. at p. 106) When she approached the robber he had no shirt, had a "smooth, baby smooth" chest, and no chest hair or tattoo. (Tr. at pps. 106-107) She further stated that he had a gold medallion on a herring bone chain around his neck. (Tr. at p. 106) The robber had no tattoos or scars on his chest. (Tr. at p. 107) She said she thought he was good looking and that she "wanted to reach out and touch the chest. But I didn't though. But it was like yea, it was nice. Nice chest. But

he was a young boy to me too, you know." (Tr. at p. 107).

It is obvious that Miss Holloman had observed the robber closely and that she had been attracted to him. She had noticed a great deal of detail regarding the robber that others would not have noticed as they were not attracted to him as she described. She was very clear and accurate about her description even to the point of the color of his shirt, which no one else could describe. She described that she had come face to face with him at the scene. (Tr. at p. 108)

Miss Holloman is also an African-American. She described the man as brown skinned, not dark skinned, with brown eyes like hers, and a smooth face with no freckles. (Tr. at p. 108-109) She is a barber and she looked at his face with detail. He had no freckles or green eyes. (Tr. at p. 109) Detective Killilea never came to see her and never showed her any photos to identify the robber. (Tr. at pps. 109-110) She testified that the Petitioner was definitely not the robber and that "the features are way off, everything really." (Tr. at pps. 110-111)

Milo Boyle, the Petitioner's ex-girlfriend at the time of the trial, testified that the Petitioner was with her at Red Lobster Restaurant and then at the movies with her seeing the movie "Soul Food" at the time of the robbery. (Tr. at p.119) She was sure of the date because it was her birthday, September 28th. She had met up with the Petitioner at approximately 4:00 p.m. that day and had remained with him up until approximately 9:45 p.m. or 10:00 p.m. that evening when they arrived at his mother's home to take her some of her birthday cake. During the entire time the Petitioner never left her presence. (Tr. at pps. 119-122) She also testified that the Petitioner had a tattoo of the star of David on his chest. (Tr. at p. 123). She stated the Petitioner had received a large sum of money from a personal injury settlement just prior to her birthday and the offense date. (Tr. at p. 124).

The Petitioner's mother, Cheryl Johnson, testified that the Petitioner left with Milo Boyle at approximately 4:00 p.m. and arrived back at her house with Milo Boyle at approximately 9:30 p.m. (Tr. at p. 128) Ms. Johnson testified that the Petitioner had just received a settlement from a personal injury case in the amount of $37,000.00 just prior to the 28th of September, 1997, and that he worked and had no need for money. (Tr. at p. 130)

Ms. Johnson testified that the Petitioner had multiple scars upon his abdomen and chest where he had his spleen removed and an apparatus installed in his vein. (Tr. at pps. 130-131). She also stated that he had a tattoo of a big star on his chest. (Tr. at p. 131)

Finally, the Petitioner testified on his own behalf. He testified that he did not rob Harrison and was not present at the Food Lion on the evening in question. (Tr. at p. 139) He was with Milo Boyle and that they had gone out to celebrate her birthday to the Red Lobster, where they obtained take out and then proceeded to the movies to see the movie "Soul Food." (Tr. at pps. 137-139) He testified that he was a convicted felon for being a lookout for someone when he was 18. (Tr. at p. 135) He is an African-American, very light skinned, with freckles across his nose, 5;10", weight 150, and light green eyes. (Tr. at p. 136).

Petitioner stated that he had a short hair cut in 1997 called a Caesar with waves and no braids. (Tr. at pps. 136-137) The Petitioner opened his shirt up to demonstrate to the court that he indeed has chest hair and also has multiple scars and a large tattoo of a star of David on his left pectoral region of his chest. (Tr. at pps.137; 141-142)

The Petitioner also testified that in August, 1997, he had received $37,000.00 from a personal injury case and also worked. (Tr. at p. 141)

Finally, and perhaps the most telling comment of the entire trial, the trial judge, when announcing judgement,

said: "it's tough for me." (Emphasis added) (Tr. at p.157) Such a phrase indicates a reservation about the Petitioner's guilt, which translates into a reasonable doubt.

The trial court's decision was based on an unreasonable determination of the facts. At a minimum, reasonable jurists could debate the sufficiency of the evidence claim, which the district court rejected out of hand.

Federal Model Jury Instructions, Criminal section P.4.01 under form Instruction 4-2, sets forth the definition of reasonable doubt which is, "It is a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life." Further it states, "Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." The trial judge acknowledged his own hesitation. Had he applied the correct standard of the law to the facts, the result would have been a finding of not guilty.

The facts in this case certainly rise to that level given the facts that the Petitioner is a very light skinned African-American with freckles, green eyes, 5'10" in height with an alibi on the night in question. The photo line up was unduly suggestive, even if one excludes the single photograph shown to two witnesse, because the lineup included on ly one man with a light complection, the Petitioner. The rest of the photographs depicted dark skinned, black males.

An independent eyewitness testified that the Petitioner was not the person with whom she came face-to-face at the scene of the crime. She clearly and with great detail described the robber, who is not the the Petitioner. She described someone who was young, with braided hair, a smooth chest, smooth face, no freckles, no tattoo and no scars. Further she described the man as having a medallion and herring bone chain. She had watched the man for some minutes before the altercation began and had studied him. She was the only

person to have observed him for any length of time.

Harrison, an African-American himself, did not know the perpetrator's eye color, did not describe a tattoo, or freckles, and did not describe the Petitioner. The only thing that Mr. Harrison really knew is that the man was light to medium complexion. There was only one photo in the line-up of a light skinned black male and that was the Petitioner. Even then, he had to be shown another single, suggestive picture, a mug shot with lighter tone to pick out the Petitioner. Mr. Harrison claimed that a light to medium skinned black male robbed him and the only one presented to him was the Petitioner, so he said it was him.

This Court has dealt with the issue of sufficiency regarding the question of reasonable doubt in Reed, et al v. Ross, 468 U.S. 1 (1984). This court stated, "the reasonable - doubt standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'...'Due process commands that no man shall lose his liberty unless the Government has borne its burden of ... convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Id. at 4,5.

In Victor v. Nebraska, 511 U.S. 1 (1994), this Court held the following definition properly defined reasonable doubt: "Reasonable Doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Id. at 7.

This Court reasoned that jurors were told that they must

have an abiding conviction, to a moral certainty, of the truth of the charge in order to convict. Therefore, the evidence must be of such a character as to leave no other alternative in the mind of the trier-of-fact than that of guilt in order to convict. Id. at 14.

In the instant case, unlike in Victor, the trier-of-fact did not demonstrate that he believed beyond a reasonable doubt that the Petitioner was guilty because he demonstrated pause when he stated, "its tough for me" at the time of the pronouncement of sentence.

Sufficiency of the evidence is still recognized as a basis for a state prisoner to obtain relief in a federal court under 28 U.S.C. 2254. This Court should except this case so that lower courts will know that this issue remains alive and well in the our judicial system.

Question 2:

Did the United States District Court and Fourth Circuit Court of Appeals err when they held that the Petitioner was not denied his right to effective assistance of counsel on appeal when the Petitioner's appellate counsel failed to perfect the appeal from the Court of Appeals of Virginia to the Supreme Court of Virginia, and as a direct result of that ineffective representation Petitioner expended a *habeas corpus* petition prepared by that ineffective lawyer, which only addressed the right to a delayed appeal and ignored everything else?

Petitioner had a right under the laws of the Commonwealth of Virginia to petition for appeal to the State Supreme Court. It is und8isputed that his trial lawyer provided ineffective representation by failing to file that petition in a timely fashion. Failure to file the petition in timely fashions bars any consideration of the case by the State Supreme Court. See Rule 5:17 of the Rules of the Supreme Court of Virginia.

Because of this obvious ineffectiveness, the habeas corpus petition that was filed, seeking only a delayed appeal, was conceded to be a petition entitled to relief by the Attorney General of Virginia. As a direct consequence of that ineffectiveness, Mr. Wiggins had to file a habeas corpus petition in Virginia because there was no other avenue to seek direct review in the State Supreme Court. The ineffectiveness on the appellate level created the circumstance which led the lower courts in this case to decide procedural default applied to the majority of the Petitioner's federal claims.

Had the district court ruled that he was entitled to effective assistance of counsel at the appellate level, rather than ignoring the issue, then that would have been ineffective representation with the resulting prejudice of the wasted initial habeas corpus petition limited to only one issue.

That initial petition was prepared by an attorney. An individual facing the loss of liberty is, and ought to be, entitled to rely on that attorney providing effective representation. This should apply whether at trial, direct appeal, or, for that matter, on collateral review. A person should not face the loss of liberty in our complex legal system because the attorney upon whom they rely is ineffective and provides representation below the standard expected of attorneys in that field of practice in that area of the country. This ought to apply when, as here, an ineffective lawyer costs the right to an initial State Supreme Court review and, makes and ineffective and unreasonable effort at relief by using Petitioner's one chance at *habeas* corpus relief for a single issue rather than the panoply, which ought to have been included.

It is the exclusive province of the U.S. Supreme Court to say what the law is. And if the law and the Constitution both apply to a particular case, the United States Supreme Court must decide which applies. Marbury v. Madison, 5 U.S. 137, 177-78 (1803). The right to the aid of counsel is fundamental in character. Powell v. Alabama, 287 U.S. 45, 68

(1932). And the attorney must play the role of an active advocate, rather than a mere friend of the court, assisting in a detached evaluation of the client's claim. Evitts v. Lucy, 469 U.S. 387, 394 (1985).

In essence, counsel's ineffective appellate assistance prejudiced the Petitioner by barring his second *habeas petition* as successive.

If not for counsel's obvious ineffectiveness in failing to perfect the appeal on time, Petitioner would not have suffered the prejudice of not having lost his right to Petition for Appeal and would not have had to file that first *habeas* petition.

His original appellate counsel's ineffectiveness at the appellate level in failing to perfect his timely appeal obviously denied him an effective *habeas corpus* collateral review of his conviction since the first *habeas* petition was only limited to the issue of whether he could file a delayed appeal. This Court ought to hear this case to determine whether that ineffectiveness entitles him to relief. The United States District Court ignored this as a cause and prejudice issue.

CONCLUSION

The Supreme Court of Virginia; the United States District Court for the Eastern District of Virginia; and the Fourth Circuit Court of Appeals have ignored case precedent established by this Honorable Court. Furthermore, they have denied the Petitioner his rights guaranteed to all citizens under the Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, this Honorable Court should overrule the decisions of the trial and appellate courts and remand this case to the trial court with an order for a new trial; and section (i) from 28 U.S.C. § 2254 because it is unconstitutional.

RESPECTFULLY SUBMITTED

AQUIL K. WIGGINS

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT
FILED
September 19, 2006

No. 05-7557
CA-03-1524-1-TSE

AQUIL KHREE WIGGINS

Petitioner - Appellant

v.

VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent - Appellee

MANDATE

The judgment of this Court, entered 7/18/06, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor

CLERK

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-7557

AQUIL KHREE WIGGINS,

Petitioner - Appellant,

versus

VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United states District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, District Judge. (CA-03-1524-1-TSE)

Submitted: May 19, 2006 Decided: July 18, 2006

Before WILLIAMS, MOTZ, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Aquil Khree Wiggins, Appellant Pro Se. Donald Eldridge

Jeffrey, III, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Aquil Khree Wiggisn seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C. § 2254 (2000). An appeal may not be taken from he final order in a § 2254 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253 (c) (1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of his constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have not independently reviewed the record and conclude that Wiggins has not made the requisite showing.

Accordingly, we deny Wiggins' motions for appointment of counsel to amend the pleadings,* and for a certificate of appealability, and we dismiss the appeal. We dispense with oral argument because of the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

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*In his motion to amend pleadings, Wiggins argues that Va. Code Ann. § 8.01-654 (B)(2) was recently amended, and now provides that "[t]he provisions of this section shall not apply to a petitioner's first petition for a writ of habeas corpus when the sole allegation of such petition is that the petitioner was deprived of the right to pursue an appeal from a final judgment of conviction." See Va. Legis. Serv. 836 (West 2005). Wiggins argues that under the amended statute, his claims are not procedurally barred because his first petition only alleged that he was deprived of his right to appeal. The amendment was approved on March 26, 2005, and went into effect on July 1, 2005. The state refused Wiggins' second petition on June 10, 2003. The amended statute does not provide that it applies retroactively, nor has the state supreme court ruled that it applies retroactively. Moreover, we must defer to the state court's application of its procedural bar rules. See Ashe v. Sykes, 39 F.3d 80, 86 (4th Cir. 1994). This claim is accordingly meritless.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AQUIL KHREE WIGGINS	)	
	)	
Petitioner,	)	
	)	
v.	)	ACTION NO. 1:03CV1524
(TSE)		
	)	
VA. DEP'T OF CORR.,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner, Aquil Khree Wiggins, a Virginia inmate proceeding pro se, filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his conviction in the Circuit Court for the City of Hampton, Virginia. On October 12, 2004, respondent filed a Motion to Dismiss and Rule 5 Answer. Wiggins was given the opportunity to file responsive materials, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), and has

filed a response. Accordingly, this matter is now ripe for disposition. For the reasons that follow, Wiggins's claims must be dismissed.

I. Background

On May 4, 1999, Wiggins was convicted in the Circuit Court for the City of Hampton of one count of robbery, one count of attempted car theft, and two counts of use of a firearm in the commission of a felony and one count of possession of a firearm by a convicted felon. Wiggins was sentenced to 35 years in prison with 19 years suspended. Wiggins pursued a direct appeal to the Court of Appeals of Virginia, which denied his petition for appeal on November 10, 1999.[1] Wiggins v. Commonwealth, R. No. 1260-99-1 (Va. Ct. App. Nov. 10,1999). Wiggins then filed a petition for writ of habeas corpus in the Circuit Court for the City of Hampton, alleging only that he was denied his right to appeal to the Supreme Court of Virginia. The Circuit Court directed

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[1]Wiggins's sole claim on appeal was the sufficiency of the evidence at trial.

the Virginia Office of the Attorney General to petition the Supreme Court of Virginia to grant Wiggins a delayed appeal. Wiggins v. Commonwealth, Law No. 01-287 (Va. Cir. Ct. May 22, 2001). On June 12, 2001, the Supreme Court of Virginia granted Wiggins a delayed appeal from the Court of Appeals. Wiggins filed a petition for appeal in the Supreme Court of Virginia, which refused the petition on November 29, 2001. Wiggins v. Commonwealth, R. No. 011617.

Wiggins then filed a second petition for writ of habeas corpus in the Circuit Court for the City of Hampton on or about October 24, 2002, raising several allegations of prosecutorial and police misconduct, ineffective assistance of counsel at trial and on appeal, and trial error. The Circuit Court dismissed all of Wiggins's claims on December 10, 2003. Wiggins v .Va. Dep't of Corr., Law No. 02-1008. The Circuit Court only addressed the ineffective assistance of counsel on appeal on the merits, and dismissed the remaining claims as procedurally barred under Virginia's successive

petition statute. Id. at 2. The Supreme Court of Virginia refused his petition for appeal on June 10, 2003. Wiggins v. Commonwealth, R. No. 030065 (Va. June 10, 2003).

On or about November 30, 2003,[2] Wiggins filed the instant federal habeas corpus petition, raising the following claims previously raised on either direct appeal or in his second state habeas petition:

(1) Prosecution failed to disclose favorable and exculpatory evidence.

(2) Prejudicial testimony at trial resulting from an unconstitutional photo identification leading to Wiggins's arrest and prosecution;

(3) Investigating officers failed to obtain a

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[2]For purposes of calculating the statute of limitations, a petition is deemed filed when the prisoner delivers his pleadings to prison officials. Lewis v. City of Richmond Police Dep't, 947 F.2d 733 (4th Cir. 1991); see also Houston v. Lack, 487 U.S. 266 (1988). It is unclear when Wiggins actually filed his petition but it was received at the Court on December 4, 2003, after Wiggins executed his petition no November 0, 2003. As it is clear Wiggins is not time-barred, the Court will not inquire any further into this issue.

preserve exculpatory evidence;

(4) Counsel provided ineffective assistance of counsel in failing to investigate into the existence of exculpatory, physical evidence adduced from testimony at trial;

(5) Counsel provided ineffective assistance of counsel in failing to investigate into evidence that someone else besides Wiggins committed the crime;

(6) Counsel provided ineffective assistance of counsel in failing to impeach allegedly fraudulent testimony from Commonwealth witnesses;

(7) Counsel provided ineffective assistance of counsel in failing to "manage his motions practice" and object to evidence against Wiggins;

(8) Counsel provided ineffective assistance of counsel in failing to prepare for oral argument

before the Supreme Court of Virginia as part of perfecting Wiggins's direct appeal;

(9) Insufficiency of evidence to support the conviction; and

(10) Counsel provided ineffective assistance of counsel in failing to file a timely appeal and failing to include all other available claims in the habeas petition for a delayed appeal.

On October 12, 2004, respondent filed a Motion to Dismiss and Rule 5 Answer. Wiggins has filed a response. Therefore, this matter is now ripe for review.

II. Exhaustion and Procedural Default

In reviewing a petition brought pursuant to 28 U.S.C. § 2254, a federal court must determine whether the petitioner has exhausted his claims before the appropriate state courts and whether those claims are barred by a procedural default. As a general rule, a petitioner must first exhaust his claims in state court because exhaustion is a matter of comity to the state courts; failure to exhaust requires dismissal from federal

court so that the petitioner may present his claims to the state courts. See Granberry v. Greer, 481 U.S. 129, 134 (1987); Rose v. Lundy, 455 U.S. 509, 515-19 (1982); 28 U.S.C. § 2254(b). To comply with the exhaustion requirement, a state prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Thus, petitioner must present the same factual and legal claims raised in the instant petition to the Supreme Court of Virginia either by way of (i) a direct appeal, (ii) a state habeas corpus petition, or (iii) an appeal from a circuit court's denial of a state habeas petition.

This, however, does not end the exhaustion analysis because "[a] claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that he claim would be procedurally barred under state law if the petitioner attempted to present it to the state court." Baker v. Corcoran, 220 F.3d 276, 288 (4th Cir. 2000) (citing

Gray v. Netherland, 518 U.S. 152, 161 (1996)). Importantly, however, "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas review of the defaulted claim." Id. (quoting Gray, 518 U.S. at 162). A petitioner may nonetheless overcome procedural defaults and have his claims addressed on the merits, by showing either cause and prejudice for the default or that miscarriage of justice would result from the lack of such review. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); Savino v. Murray, 82 F.3d 593, 602 (4th Cir. 1996). The existence of cause ordinarily turns upon a showing of (1) a denial of effective assistance of counsel, (2) a factor external to the defense which impeded compliance with the state procedural rule, or (3) the novelty of the claim. See Coleman, 501 U.S. at 753-54; Clozza v. Murray, 913 F.2d 1092, 1104 (4th Cir. 1990); Clanton v. Muncy, 845 F.2d 1238, 1241-42 (4th Cir. 1988).

In the instant petition, respondent concedes that

Wiggins has exhausted his state remedies with respect to all claims now before this Court. Wiggins's claims 1, 2, 3, 4, 5, 6 and 7 were dismissed by the Supreme Court of Virginia as procedurally defaulted as a successive petition under Virginia Code § 8.01-654(B)(2).[3] It is clear that this statute constitutes an adequate and independent state law ground which renders these claims defaulted in federal habeas corpus, as articulated in Mackall v. Angelone, 131 F.3d 442, 446 (4th Cir. 1997). Wiggins has neither advanced an argument that might warrant a finding of cause or prejudice to excuse his procedural default, nor has he presented any evidence or argument that a fundamental miscarriage of justice would occur absent review of these claims. In response to the Commonwealth's argument of procedural default, Wiggins merely asserts that allegedly erroneous legal

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[3]The Supreme Court of Virginia denied Wiggins's petition for appeal without explanation. In these circumstances, it is appropriate to infer that the Supreme Court's ruling was based on the same reasoning as the Circuit Court for the City of Hampton. See Yist v. Nunnemaker, 501 U.S. 797, 803 (1991) (allowing federal courts to examine a lower state court's decision when the state's highest court rejects or denies the appeal of that decision without discussion or explanation).

advice from his appellate counsel constitutes cause as to why other available claims were not included in Wiggins's initial state habeas petition. This argument is without merit. See Mackall, 131 F.3d at 449 (rejecting a similar argument for "cause" because there is no constitutional right to effective assistance of counsel in state habeas proceedings). Accordingly, claims 1, 2, 3, 4, 5, 6, and 7 are procedurally defaulted, may not be raised on federal habeas review, and must be dismissed.

Claim 10 consists of a two-part ineffective assistance claim in counsel's (1) failure to file a timely appeal and (2) failure to include all available claims in Wiggins's first state habeas corpus petition. The first part of this claim was rendered moot by the Supreme Court of Virginia's granting Wiggins a delayed appeal. The second part of this claim was first presented to a Virginia court on appeal to the Supreme Court of Virginia from the denial of Wiggins's second habeas petition, which in turn refused the petition for appeal. Although this claim was never considered on the merits by a

state court, it is nonetheless exhausted because Wiggins is now precluded from bring this claim in state court. Specifically, this claim would now be procedurally defaulted both under Virginia Code § 8.01-654(a)(2) (state habeas petition one-year statute of limitations) and Virginia Code § 8.01-654(b)(2) (state's successive petition statute). Therefore, this claim is simultaneously exhausted and defaulted for the purposes of federal habeas review. See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990). As such, the remaining portion of claim 10 is barred from review and must be dismissed.[4] Because remaining claims 8 and 9 were exhausted and not found to be procedurally defaulted, they will be considered on the merits.

III. Standard of Review

Wiggins's claims must be reviewed on the merits under the standard set forth in 28 U.S.C. § 2254(d). When a state court has addressed the merits of a claim raised in a

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[4]Wiggins provides no argument as to why the procedural default should not apply.

federal habeas petition, a federal court may not grant the petition based on the claim unless the state court's adjudications are contrary to, or an unreasonable application of, clearly established federal law, or are based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). The evaluation of whether a state court decision is "contrary to" or "an unreasonable application of" federal law is based on an independent review of each standard. See Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A state court determination meets the "contrary to" standard if it "arrives at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law or if the state court decides a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413. Under the "unreasonable application" clause, the writ should be granted if the federal court finds that the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts

of the prisoner's case." Id. Moreover, this standard of reasonableness is an objective one. Id. at 410.

IV. Merits

A. Claim 8 - Ineffective Assistance on Appeal

Wiggins argue his appellate counsel provided ineffective assistance of counsel in consenting to an expedited argument before the chief staff attorney of the Supreme Court of Virginia instead of before a panel of the court. The Circuit Court rejected this claim on the merits, and the Circuit Court's reasoning is considered imputed to the Supreme Court of Virginia, which refused the appeal without explanation, see Yist, 501 U.S. at 803. Specifically, the state court dismissed the claim as failing to satisfy the standard for ineffective assistance of counsel articulated in Strickland v. Washington, 466 U.S. 668 (1984). Wiggins, Law No. 02-1008, slip op at 2-3. In reviewing the state court's decision as to claim 8, Wiggins has failed to show that the result was either contrary to, or an unreasonable application of, federal law. In considering an ineffective

assistance of counsel claim, a court must determine whether (1) "in light of all circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690 (defining effective assistance of counsel as falling below an objective of reasonableness and applying a strong presumption of competence and deference to attorney judgment), and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A successful petition "must show both deficient performance and prejudice," and "the two are separate and distinct elements of an ineffective assistance claim." Spencer v. Murray, 18 F.3d 229, 232-33 (4th Cir. 1994). Moreover, a court does not need to review the reasonableness of counsel's performance if petitioner fails to show prejudice. Quesinberry v. Taylor, 162 F.3d 273, 278 (4th Cir. 1998).

With respect to the first prong of the Strickland test, "[j]udicial scrutiny of counsel's performance must be highly

deferential," Strickland, 466 U.S. at 689, and this Court must "presume that challenged acts are likely the result of sound strategy." Spencer, 18 F.3d at 233. With respect to the second prong of the Strickland test, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In order to undermine confidence in the case outcome, petitioner must show more than a remote possibility that the results of the trial would have been different. Washing v. Murray, 4 F.3d 1285, 1290 (4th Cir. 1993).

In applying Strickland to the facts of this case, it is clear that Wiggins's claim fails. As to the "performance" prong, Wiggins's only assertion is that his appellate counsel opted to argue the direct appeal from the Court of Appeals of Virginia to the chief staff attorney of the Supreme Court of Virginia, instead of before a panel of the court. In Strickland, the Supreme Court admonished defendants not to engage in the second-guessing of their counsel's performance, particularly after the defendant loses his case. See 466 U.S.

at 690-91 (deeming trial tactics are the purview of the representing counsel). Wiggins's claim 8 is an attempt by petitioner to engage in such second-guessing. Appellate counsel's tactical decision concerning the presentation of an appellate case does not run afoul of the performance prong of Strickland.[5] Therefore, the state court's decision was neither contrary to, nor an unreasonable application of, federal law, and claim 9 must be dismissed.

B. Claim 9 - Insufficiency of the Evidence

Wiggins next contends that the evidence was insufficient to support his conviction. The standard of review in habeas corpus of an insufficiency of the evidence claim is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319

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[5]Even if counsel's decision satisfied the performance prong, Wiggins has not shown that but for his counsel's performance there is a reasonable probability there would have been a different outcome to his appeal. See Washington, 4 F.3d at 1290. Thus, his claim also fails the prejudice prong of Strickland.

(1979). From he record in this case, it is clear that Wiggins has not shown that his conviction was unreasonable in light of the evidence presented at trial.

At trial, the Commonwealth presented evidence concerning eyewitness identification of Wiggins as the assailant. On appeal, the Court of Appeals of Virginia found in the last reasoning state opinion on the matter, that three witnesses identified Wiggins as the assailant.

> The victim testified that on Sunday, September 28, 1997, he went to a grocery store. As he entered the store, he observed [Wiggins] standing under a light near the cart return area. After making his purchase, the victim placed the items in his car and returned the cat. The victim had to walk past appellant to return the cart, and when the victim turned around, appellant held a gun to the victim's side and said, "Give me your wallet, Old Man or I will kill you." Appellant repeated his demand for the victim's wallet.
>
> The victim testified that he was concerned because the men stood near a light and the victim could see appellant's face. The victim stated that appellant wore no disguise. Appellant took the victim's wallet and car keys, and he entered the victim's car. The victim the approached the car and

pulled appellant from the car. The two men "scuffled," and the victim pulled off appellant's shirt. Appellant stood and said, "Now I am going to kill you." A woman ran toward the men, screaming, and appellant fled.

The victim gave police a description of appellant within two days of the incident. The police developed a composite drawing based on the victim's description. About one week to ten days later, the police showed the victim a photo array of six photographs. Within two to three minutes of viewing the photo spread, the victim chose appellant's photograph. The victim also positively identified appellant in court as the robber, stating that he had no doubt that appellant was the perpetrator. He testified, "[I]t was burned into my mind, my eyes . . . what he look like . . . . I made sure that I knew who was trying to take my life."

The victim testified that the incident occurred at about 8:50 p.m. and the lighting was "very good." The victim stated that appellant was a black male, with a light to medium complexion, stood five feet, seven inches tall, and wore a light-colored skull cap and baggie pants.

Eve Jernigan testified that she was an eyewitness to the incident. She sat in her car, which was parked next to the victim's car, during the robbery. Jernigan stated that there was a street lamp near her car and a street lamp near the cart return area.

> About one month after the incident, he police showed Jernigan a photograph array. Jernigan stated that she initially chose three photographs, then because Jernigan stated that appellant wore a bandana during the incident, the officer placed an envelope over the top portion of two of the pictures. Jernigan then chose appellant's picture from the photo spread.
>
> Jernigan testified that the office showed her the photo array did not tell her that the robber's picture was in the photo display. He instructed Jernigan to choose a picture if she believed she saw a picture of the robber, and he advised her that the robber's picture might not be in the group.
>
> Jernigan also described appellant's clothing as a large t-shirt, baggie pants, and a white sweatband or bandana. She stated that she saw appellant from a distance of about ten to twelve feet. Jernigan positively identified appellant in court as the robber, stating that she was "sure" of her identification of him.
>
> . . .
>
> Karen McAdoo testified that she saw appellant near the cart return at the grocery store on the night of the incident, She then saw appellant and the victim struggle as she sat in her car located only two to three feet away from the men. McAdoo positively identified appellant in court as the robber.

Wiggins, R. No. 1260-99-1, slip op. at 2-4. The state court also found evidence of other witnesses who denied Wiggins's

involvement.

> Crystal Holloman testified on behalf of appellant. Holloman was also at the scene of the crime, but she testified that appellant was not the robber. Milo Boyle, appellant's girlfriend, testified that she was with appellant on the evening of the incident. Appellant denied that he committed the offense, testifying that he was with Boyle on the night of the incident.

Id. at 5.

> In resolving the seemingly conflicting identification evidence, the state court concluded that
>
> [B]oth the victim and Jernigan stated that the light was good during the crime. Both witnesses had ample opportunity to view appellant from a close range at the time of the crime, and they gave similar descriptions of his clothing. They also readily chose his picture from the photo array soon after the incident and positively identified him in court as the perpetrator. Moreover, McAdoo, another eyewitness to the crime, identified appellant as the robber. In addition, appellant has pointed to nothing that indicates that the photograph array was "so unduly suggestive as to render [the witnesses'] in-court identification so unreliable as to raise a substantial likelihood that [they] misidentified appellant." [citation omitted]

> Furthermore, the fact finder believed in testimony of the Commonwealth's witnesses and did not believe appellant's evidence . . . The testimony of the Commonwealth's witnesses was competent, was not inherently incredible, and was not so unreliable as to create a substantial likelihood of misidentification. Therefore, from the testimony of these witnesses, the fact finder could conclude beyond a reasonable doubt that appellant committed the charged offenses.

Id. at 5-6. The Supreme Court of Virginia dismissed Wiggins's petition for appeal without explanation. Wiggins v. Commonwealth, R. No. 011617 (Va. Nov. 29, 2001). This Court must infer the Virginia Supreme Court's dismissal was for the same reasoning as offered by the Virginia Court of Appeals. See Yist, 501 U.S. at 803.

After reviewing the evidence in light of the most favorable to the Commonwealth and with the deference accorded to the state court's factual and legal findings in this regard, this Court finds that a rational trier of fact could have found beyond a reasonable doubt the essential elements of his convicted offenses. Thus, under an objective standard, the

state court's decision with regard to the sufficiency of the evidence was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based upon an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). Accordingly, Wiggins's claim 9 must be dismissed.

IV. Conclusion

For the reasons stated above, respondent's Motion to Dismiss must be granted and the petition dismissed.. An appropriate Order shall issue.

Dated: 8/29/05 /s/

Alexandria, Virginia UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AQUIL KHREE WIGGINS	)	
	)	
Petitioner,	)	
	)	
v.	)	ACTION NO. 1:03CV1524
(TSE)		
	)	
VA. DEP'T OF CORR.,	)	
	)	
Respondent.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that respondent's Motion to Dismiss is **GRANTED** and this petition is **DISMISSED.**

Should petitioner wish to appeal, petitioner must file a notice of appeal within thirty (30) days of the date of this Order. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For reasons stated in the accompanying Memorandum Opinion, this Court expressly

declines to issue such a certificate.

The Clerk is DIRECTED to send a copy of this Order to petitioner and counsel of record for respondent.

Dated: 8/29/05

/s/

Alexandria, Virginia

UNITED STATES DISTRICT JUDGE